INDEX

	Page
Question presented	1
Statement	2
Discussion	7
Conclusion	16

CITATIONS

Cases:

Austin v. *New Hampshire*, 420 U.S. 656	12
Hays v. *Potlatch Forests, Inc.*, 465 F. 2d 1081	5, 12, 13
Kelly v. *Washington*, 302 U.S. 1	8–9
Mengelkoch v. *Industrial Welfare Comm.*, No. 66–1618–ALS, decided December 9, 1971 (C.D. Cal.), on remand, 442 F. 2d 1119	4
Merrill Lynch, Pierce, Fenner & Smith v. *Ware*, 414 U.S. 117	9
Missouri ex rel. Gaines v. *Canda*, 305 U.S. 337	12
Rosenfeld v. *Southern Pacific Co.*, 444 F. 2d 1219	4
Schultz v. *Wheaton Glass Co.*, 421 F. 2d 259, certiorari denied, 398 U.S. 905	11
Silver v. *New York Stock Exchange*, 373 U.S. 341	9
Southern Pacific Co., v. *Arizona*, 325 U.S. 761	9

Statutes and regulations:

Civil Rights Act of 1964, 78 Stat. 241, *et seq.*, as amended 42 U.S.C. 1971, *et seq*:	
Section 703(a), 42 U.S.C. 2000e–2(a)	2, 9
Section 708, 42 U.S.C. 2000e–7	9
Section 1104, 42 U.S.C. 2000h–4	4
Equal Pay Act of 1963, Section 3, 77 Stat. 56, amending the Fair Labor Standards Act of 1938, Section 6, 52 Stat. 1062, as amended, 29 U.S.C. 206	5
29 U.S.C. 206(d)(1)	10
29 U.S.C. 218(a)	9
California Labor Code, Sections 1171–1204 (West 1971)	3
29 C.F.R. 800.162	10
29 C.F.R. 1350	3, 4
29 C.F.R. 1350.5	3, 4, 9, 12, 14
29 C.F.R. 1604.2	11

595-646—75——1

CITATIONS—continued

Miscellaneous:

Note, "*Employment Practices and Sex Discrimination: Judicial Extension of Beneficial Female Protective Labor Laws*," 59 Cornell L. Rev. 133 (1973)-------- Page 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1213

STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL WELFARE, ET AL., PETITIONERS

v.

HOMEMAKERS, INC., OF LOS ANGELES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed pursuant to the Court's invitation of June 9, 1975.

QUESTION PRESENTED

Whether certain California statutes and regulations which require that covered employers pay premium overtime wages to female employees, but are silent as to compensation of male overtime workers, conflict with Section 703(a) of Title VII of the fed-

eral Civil Rights Act of 1964, which prohibits sex-based discrimination in employment.

STATEMENT

This is an action brought by Homemakers, Inc., a California corporation which employs both men and women to work as domestic laborers and to care for the sick in the patients' homes. Faced with threatened enforcement by the California Division of Industrial Welfare [1] of state statutes and regulations requiring that employers pay premium "time and a half" wages for overtime work by female employees, Homemakers brought suit in the United States District Court for the Northern District of California for declaratory and injunctive relief, alleging that, since the state statutes and regulations impose no similar duty to pay premium wages to male employees who work overtime, they are invalid because in conflict with the prohibition of sex-based discrimination in employment contained in Section 703(a) of Title VII of the 1964 Civil Rights Act, 78 Stat. 255, 42 U.S.C. 2000e–2(a).[2]

[1] The Division of Industrial Welfare of the California Department of Industrial Relations enforces the regulations promulgated by the Industrial Welfare Commission, an autonomous body within the Division. In an audit of Homemakers' records for the period January 1971 through June 1972, the Division determined that Homemakers had failed to pay $18,785 in premium overtime wages to 208 female employees. See the State's brief on appeal at 3 (a copy of which we are lodging with the Clerk of this Court).

[2] Section 703(a) provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *."

At the time of suit, the Industrial Welfare Commission was empowered generally to regulate the wages, hours, and working conditions of female employees "in any occupation, trade, or industry" in the State.[3] In the exercise of these powers it had promulgated Order 5–68, which set maximum hours and rates of overtime pay for female employees in the "Public Housekeeping Industry."[4]

The statutory scheme includes, in addition to regulations promulgated by the Commission, specific maximum hour and overtime wage provisions in Sections 1350 and 1350.5. The former limits the maximum hours that women employed in certain industries may work, except as allowed by the latter. Section 1350.5, the coverage of which is generally co-extensive with the coverage of the federal Fair Labor Standards Act,[5] provides that covered women employees may be employed up to ten hours per day or 50 hours per week, provided that they are paid time and a half wages for hours worked beyond eight daily or 40 weekly. The hour limitations contained in both sections have been struck down as inconsistent with

[3] See Sections 1171–1204 of the California Labor Code (West 1971), applicable at the time of suit only to women and minors, but amended before the court of appeals' decision to include adult male employees as well. The effect of the amendment on this case is discussed at pp. 14–15, *infra*.

[4] The Order is reproduced in full at Exhibit B of the State's brief on appeal. We are advised by the Division of Industrial Welfare that the Commission has promulgated thirteen other orders with similar overtime provisions covering different industries. Presumably they stand or fall with Order 5–68 and the statutes at issue here.

[5] See Pet. App. C, and pp. 13–14, *infra*.

Title VII.[6] The result is that Section 1350 is of no effect whatever, and that the inconsistency with federal law that Homemakers alleges arises solely from Section 1350.5's requirement that covered employers pay premium wages to female employees who work overtime. Although to our knowledge the maximum hour limitations of Order 5–68 have not explicitly been invalidated by judicial decree, it is our understanding that the State does not assert their validity and that, as with Section 1350.5, only the overtime wage provisions of the Order are contested.[7]

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[6] *Rosenfeld* v. *Southern Pacific Co.*, 444 F. 2d 1219, 1225–1226 (C.A. 9); *Mengelkoch* v. *Industrial Welfare Comm'n*, No. 66–1618–ALS, decided December 9, 1971 (C.D. Calif.), on remand from *id.*, 442 F.2d 1119 (C.A. 9).

[7] Although Homemakers states (see its brief on appeal, a copy of which we are lodging with the Clerk of this Court, at 28) that the enforcement action threatened against it was to be based principally on the provisions of the Order, we are informed by the Division of Industrial Welfare that they intended to enforce the provisions of Section 1350.5 against Homemakers, and that the Order, which applies "except as otherwise provided by statute," is inapplicable given Homemakers' coverage by Section 1350.5.

Homemakers has not, in this case, contested the applicability of Section 1350.5, although in a pending case in the Sixth Circuit, *Homemakers Home and Health Care Services, Inc.* v. *Carden*, No. 74–1680, Homemakers has sought a declaratory judgment that it is not subject to the Fair Labor Standards Act. Since exemption under that law would apparently make Section 1350.5 inapplicable (see Pet. App. C), if Homemakers prevails in that case on grounds that apply also to the California corporation, then Homemakers would be subject only to the Order of the Industrial Welfare Commission. On the other hand, if Homemakers is subject to the Fair Labor Standards Act, its challenge to the state law here would not affect its obligation to comply with the federal Act's overtime wage requirements.

The district court granted summary judgment for Homemakers (Pet. App. B), rejecting the State's argument (*id.* at viii–ix) that "the necessary consistency" between the state and federal laws "can be found in the state statutes by interpreting them as requiring the employer, if he chooses to have any employees work overtime, to pay the same overtime premium to men as well as to women." Even though the Eighth Circuit had recently accepted a similar argument in *Hays* v. *Potlatch Forests, Inc.*, 465 F. 2d 1081, such an interpretation, said the court (*id.* at ix), "would constitute usurpation of the legislative power that has been vested exclusively in the state Legislature * * * [and] that a federal court may not exercise * * * in order to avoid a conflict between state and federal law."

The district court also rejected the Commission's argument (*ibid*) that federal and state "Equal Pay" laws require that Homemakers equalize any discrepancy between the overtime wages paid to women and to men by raising the lower wage to the higher—*i.e.*, by paying men premium overtime wages—rather than by reducing all wages to the lowest paid, which the statutes forbid.[8] The court ruled (*id.* at x) that this would "extend the benefits of the [state] statutes

[8] Section 3 of the federal Equal Pay Act of 1963, 77 Stat. 56, amending Section 6 of the Fair Labor Standards Act of 1938, 52 Stat. 1062, as amended, 29 U.S.C. 206, provides: "No employer having employees subject to any provisions of this section shall discriminate * * * between employees on the basis of sex by paying wages to employees * * * at a rate less than the rate at which he pays wages to employees of the opposite sex * * * for equal work on jobs * * * requir[ing] equal skill * * *, except [for valid, nonsex-related reasons]: *Provided*, That an employer

to an entirely new class of beneficiaries [and] would thus be a substantial change in legislative intent * * * [which] should be made by the legislature, not the courts." Finally, the district court noted (*id.* at xi) in support of its decision that a bill which would have extended the coverage of the state labor laws relating to women and minors to all employees had recently failed of enactment.

The court of appeals affirmed (Pet. App. A), explicitly approving the district court's refusal to interpret the state statutes as mandating premium overtime pay to male employees. "Such judicial restraint," said the court (*id.* at iv–v), "appears particularly warranted" since the legislative intent behind the challenged laws—"to afford special protection for women employees"—had been relied on by the court "in invalidating other 'protective' legislation in the California Labor Code as unlawfully discriminatory," and "it is not within the province of the federal courts to attempt to determine how far, if at all, subsequent state legislation has shown an intent to redirect the original focus of the premium pay provisions * * *" (footnote omitted).

The court of appeals also noted (*id.* at vi) that a

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who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

Although Homemakers might have claimed that the state laws were inconsistent with the Equal Pay Act as well as with Title VII, it did not do so. The Equal Pay Act would apply, of course, only if Homemakers were subject to the Fair Labor Standards Act. See note 7, *supra*.

The state Equal Pay Act is set forth at Pet. App. D.

new state law (discussed *infra*) had been enacted since the district court had rendered its decision, extending the state labor laws relating to women and minors to men, and empowering the Industrial Welfare Commission to prescribe premium overtime pay for men and women alike. Although the district court had considered its decision supported by the previous failure of this bill, the court of appeals apparently deemed its passage also to warrant judgment for Homemakers.

DISCUSSION

The fate of women's "protective" laws since passage of the Civil Rights Act of 1964 has been the subject of considerable controversy.[9] In many cases protective laws which had the effect of restricting women's access to the employment market, either directly (as by limiting the number of hours they could work or the types of jobs they could hold) or indirectly (as by inducing employers not to hire women because it would be simpler or cheaper to hire men), have been struck down as inconsistent with Title VII.[10] Although in some cases employers could have complied with these state laws, without violating Title VII, by also treating men the way the statutes required women to be treated, as a practical matter some of the restrictions could not feasibly be applied to male employees as well (as, for example, where maximum hour limitations were impractical).

[9] See Note, "*Employment Practices and Sex Discrimination: Judicial Extension of Beneficial Female Protective Labor Laws*," 59 Cornell L. Rev. 133 (1973).

[10] See, *e.g.*, *id.* at 135, 146–149 (and cases cited therein).

Other protective laws, however, such as minimum wage and premium overtime pay provisions, which are of easier practical application to men as well as women, have been found to be reconcilable with the antidiscrimination provisions of Title VII: since the employer is not forbidden by state law to pay the minimum wage or premium overtime to male employees, he can comply with the state protective law by affording the prescribed benefits to women and with the federal law's injunction against sex-based discrimination by affording them to men as well.[11]

We agree with the State that the court of appeals erred in striking down the state laws under the Supremacy Clause, and that its decision is essentially in conflict with that of another court of appeals. While the record in this case does not fully reveal the likely impact of this decision in the State of California or its potential effect on the development of the law in this area, we nonetheless believe that the State's petition should be granted [12] and the judgment should be reversed.

1. It is well settled that a state law should be struck down for inconsistency with a federal statute "only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' " *Kelly* v. *Washington,* 302 U.S. 1, 10 (citing numerous authorities). Where, as

[11] See, *e.g.*, *id.* at 141–146.

[12] We note that, although petitioner has invoked this Court's certiorari jurisdiction, review by way of appeal under 28 U.S.C. 1254(2) might have been sought instead.

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here, Congress has not occupied the field to the exclusion of the states' regulatory powers,[13] "the proper approach" in cases where conflict is alleged "is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 127 (quoting from *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357). Thus, unless Section 1350.5, or Order 5–68, "in terms or in its practical administration, conflicts with [Title VII], or plainly and palpably infringes its policy" (*Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 766), the court of appeals should not have held these laws invalid.

In our view, Section 1350.5 and Order 5–68 are not incompatible with Section 703(a) of Title VII. Both state provisions require covered employers to pay overtime wages to women at one-and-a-half

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[13] Two provisions of the Civil Rights Act of 1964 expressly affirm the right of the states to retain or enact laws on the same subject. Section 708 of Title VII, 42 U.S.C. 2000e–7 provides: "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

And Section 1104 of Title XI, 42 U.S.C. 2000h–4 provides: "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

The Fair Labor Standards Act, which includes the Equal Pay Act, contains a provision to similar effect. See 29 U.S.C. 218(a).

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times their regular rate of pay. They do not require or prohibit payment of such wages to men. Neither Title VII nor the Equal Pay Act prescribes actual rates of pay; both insist, in broad terms, that men and women be paid the same rate for the same work. Thus an employer can, in compliance with state law, pay overtime to women, and, without offense to state law and in compliance with federal law, pay the same overtime to men.

Indeed, the federal Equal Pay Act, which prohibits sex discrimination with respect to wages, provides that——

> an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage of any employee [29 U.S.C. 206(d)(1)].

Accordingly, a regulation of the Wage and Hour Administrator of the Department of Labor, the agency which administers the Equal Pay Act, states that employers who are required by state law to pay female employees premium overtime must, under federal law, pay similar overtime to male employees performing equal work.[14]

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[14] This regulation, 29 C.F.R. 800.162, provides:

"§ 800.162—*Overtime payments required by state law* [:]

"The application of the equal pay provisions of the Act may also be affected by State legal requirements with respect to overtime pay. If as a result of a state law, female employees in an employer's establishment are paid overtime premiums for hours worked in excess of a prescribed maximum in any workday or workweek, the employer must pay male employees performing equal work in such establishment the same overtime premiums when they work such excess hours, in order to comply with the equal pay provisions of the Fair Labor Standards Act. This would

As regards wages, Title VII and the federal Equal Pay Act are in *pari materia* and are to be construed to complement each other, *Schultz* v. *Wheaton Glass Co.*, 421 F. 2d 259, 266 (C.A. 3), certiorari denied, 398 U.S. 905. Read together, the two statutes evidence a dual congressional objective—(1) to eliminate sex-based wage discrimination; and (2) to promote the economic security of employees by requiring that, in equalizing their pay, the employer raise the wages of those paid less rather than lowering the wages of those paid more. Accordingly, the Equal Employment Opportunity Commission, the agency which administers and interprets Title VII, has taken the position in interpretative regulations that Title VII does not conflict with state overtime laws for women, but requires that such benefits be paid also to men.[15]

It thus has been the consistent position of the agencies administering both federal statutes in this

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be true even though both the male and the female employees performing equal work are otherwise qualified for exemption from the overtime pay requirements of section 7 of the Fair Labor Standards Act. It would not be true, however, unless the overtime requiring the premium pay is actually being worked by the women."

[15] The regulation, 29 C.F.R. 1604.2, provides in pertinent part:

"§ 1604.2 *Sex as a bona fide occupational qualification.*

"(b) Effect of sex-oriented State employment legislation.

* * * * * * *

"(3) A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

"(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by State law; or

"(ii) It does not provide the same benefits for male employees."

field that state laws like those at issue here do not conflict with federal law and policy, but merely trigger the operation of the federal law. At least where, as here, no showing has been made that the state laws at issue operate to discourage employers from hiring women,[16] such laws should not be struck down under the Supremacy Clause.

Contrary to the view of the court of appeals (and apparently of petitioner as well), there is no need here, in order to save the state laws, to extend their overtime pay benefits to men as well as women. No more need be held in this case than that Section 1350.5 and Order 5–68 do not, by requiring premium overtime wages for women, conflict with federal law. Any obligation thereafter faced by employers to pay such wages to men will arise under the federal law. Thus the court's fear that it would trench on the prerogatives of the state legislature by construing a state statute to reach beyond its terms was unfounded.[17]

2. In *Hays* v. *Potlach Forests, Inc.*, 465 F.2d 1081, the Eighth Circuit upheld an Arkansas statute requiring premium overtime pay for women against a challenge, like that brought by Homemakers here, that it

[16] Discriminatory hiring practices to avoid the effect of such laws would, of course, violate Title VII. See n. 2, *supra*.

[17] We do not believe that the mere fact that the remedy for women would be that afforded by state law, while that for men would be the federal remedy, rises to the level of an equal protection violation, so long as both remedies are adequate and effective. But cf. *Austin* v. *New Hampshire*, 420 U.S. 656; *Missouri ex rel Gaines* v. *Canada*, 305 U.S. 337.

was in conflict with Title VII and the federal Equal Pay Act. The court held, first, that the state statute was not necessarily inconsistent with Title VII because it "'does not say that women must be paid more than men; it simply says that they must be paid daily overtime without making a similar requirement as to men' " (465 F. 2d at 1082); and, second, that "any discrimination against men resulting from the Arkansas statute is to be cured by extending the benefits of that statute to male employees * * *" (*id.* at 1083).

In our view the court went further than necessary in reaching the latter conclusion, since it need have found no more than that the state requirement to pay women "time and a half" did not conflict with the federal requirements of equal treatment. Indeed, the employer in *Hays* had "been paying its male employees, as well as its female employees, the same premium overtime rate" and "conceded that the anti-sex discrimination provisions of Title VII will compel it to continue doing so" if the Arkansas statute were upheld (as it was). *Id.* at 1083. That, we submit, was a sufficient basis in itself for the result reached in *Hays*. Although the court in *Hays* chose to ground its decision on a construction of the Arkansas law, that law was virtually indistinguishable from those at issue here and the decision conflicts, in result, with that of the court below.

3. We find nothing in the record on which to base an accurate estimate of the number of employees potentially affected by the court of appeals' decision in the present case. Given the largely co-extensive coverage of the Fair Labor Standards Act (which

contains overtime provisions) and Section 1350.5,[18] the employees in California who look exclusively to state law for overtime wage protection are those covered by the orders of the Industrial Welfare Commission. We are advised by the California Division of Industrial Welfare that, out of a total workforce (excluding supervisory and government personnel) of about 6,137,000, the number of such employees, both male and female, amounts to some 2,316,000.[19]

As Homemakers points out (Brief for Respondent at 4), some of these employees may be assured of premium overtime pay by virtue of private agreement with their employers, although such agreements will no longer be backed by force of law if the decision below stands.

Shortly before the court of appeals' decision in this case California enacted Assembly Bill No. 478, which extends to men most of the general statutory provisions as to minimum wages and working conditions previously applicable only to women. The act apparently has no effect on Section 1350.5, however, and we understand that its legislative history con-

[18] Section 1350.5 differs from the overtime provisions of the Fair Labor Standards Act in that it provides for daily overtime payments, whereas the federal Act mandates premium overtime only after an employee has worked more than a certain number of hours in a week. Section 1350.5 and the federal Act also differ in coverage in that the former exempts all employers of employees exempted under the latter as of February 1, 1967. Changes in the federal law since then have not been mirrored in the state law.

[19] In its motion for stay pending appeal, Whitlow affidavit at 3 (we are lodging a copy with the Clerk of this Court), the state represented that "at least 800,000 women employees are dependent exclusively upon state regulations for such protection from exploitation as they currently enjoy."

tains no reference to that statute. The new act also empowers the Industrial Welfare Commission to regulate wages and conditions of employment with respect to the entire workforce, not just women and minors (although it does not automatically confer on men the benefits of the Commission's previously passed orders, such as Order 5–68: new action by the Commission, which apparently has not yet been taken, will be necessary to have this effect).

The passage of Assembly Bill No. 478 does not render this case moot, since Homemakers' past and future obligations under the stricken state laws are still in issue. But in the court of appeals the state said that the act "has momentous impact upon the issues of this lawsuit" and "will undoubtedly obviate the 'conflict' between federal and state laws found to exist by the District Court."[20] In short given the Commission's ability now to regulate overtime pay for both men and women, the decision of the court of appeals need cause no lasting interference with state labor law policy.

4. We believe, nevertheless, that certiorari should be granted because of the continuing importance of the conflict between the decision below and that in *Hays* in reconciling federal and state law in this area. In addition to California and Arkansas, several other states have premium overtime wage statutes or other "protective" provisions applicable only to women.[21]

[20] See the State Reply Brief on appeal at 2 (we are lodging a copy with the Clerk of this Court). The full text of Assembly Bill No. 478 also appears therein.

[21] According to the Women's Bureau of the Employment Stand-

Employers and employees in all of these states are in need of guidance as to the continuing validity of such laws and the obligations they trigger under federal law.

CONCLUSION

For the foregoing reasons, the United States believes that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1975.

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ards Administration, U.S. Department of Labor, Colorado, Idaho, Texas, Wisconsin, and Wyoming have such overtime laws. Colorado, Utah and Wisconsin have minimum wage provisions for women only, and Kansas and Louisiana provide for minimum wage orders for women, although none is now in effect. In addition, numerous states have meal period, rest period, seating requirement, or other protective laws applicable only to women.